IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 576 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

UTTAMBHAI MANILAL PATEL

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 576 of 2001
MR DEEPAK M SHAH for Petitioner No. 1
THROUGH JAIL for Petitioner No. 1
MR RM CHAUHAN, APP for Respondent

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE H.H.MEHTA

Date of decision: 11/03/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

Admitted. Mr.R.M.Chauhan, learned A.P.P. waives service of notice on behalf of the respondent. In view of the joint request made by the learned counsel for the parties and having regard to the facts of the case, the appeal is taken-up for final hearing today.

2. In this appeal, which is filed under section 374(2) of the Code of Criminal Procedure, 1973, the appellant has challenged legality of judgment dated June 30, 2001, rendered by the learned Additional Sessions Judge, Surat,in Sessions Case No.49/98, by which he is convicted under section 302 of the Indian Penal Code and punished with R.I. for life.

3. Complainant Maganbhai Murarbhai was residing at Udhana-Surat. The name of one of his daughters was Pushpaben. Pushpaben was married to the appellant. During the subsistence of the marriage, Pushpaben had given birth to two children, one of whom is a girl named Jesmin and another is a son named Vimal. The appellant had doubt about the character of deceased Pushpaben and was, therefore, quarrelling and beating her off and on. Three months prior to the incident, the appellant had subjected the deceased to beating and, therefore, the deceased with her to children had come to reside with her father i.e. Maganbhai Morarbhai. The appellant had come to the house of his father-in-law for the purpose of bringing the deceased and children with him and informed the father-in-law that he was to take the deceased and children to Khadakuva Rander. The incident in question took place in the night of August 3, 1997. On the night of the incident, the daughter was sleeping on a cot, whereas the appellant, the deceased and son Vimal were sleeping in another room on the floor. The appellant had got-up during the night hours and after lifting his son Vimal physically, had placed him in the cot on which his daughter was also sleeping. Thereafter the deceased had strangulated his wife Pushpaben to death. Because of strangulation, the deceased had raised shouts and the incident in question was seen by the children. In the next day morning, the incident was reported to the father of the deceased, who had lodged complaint with Rander Police Station. The case was investigated initially by P.S.I. Mr. G.C.Gamit and thereafter P.I. Mr. T.V.Parghi. Mr. Gamit had made arrangement for sending dead body to the hospital for postmortem examination and recorded statements of witnesses who were found to be conversant with the facts of the case. P.S.I.Mr. Parghi had arrested the appellant and also recorded statements

of other witnesses. On completion of investigation, the appellant was chargesheeted of the offence punishable under section 302 of the Indian Penal Code in the Court of learned J.M.F.C. Surat. As the offence punishable under section 302 I.P.C. is exclusively triable by the Court of Sessions, the case was committed to the Sessions Court, Surat for trial, where it was numbered as Sessions Case No. 49/98. The learned Judge had framed charge against the appellant at Exh.4 of the offence punishable under section 302 of the Indian Penal Code. The charge was read over and explained to the appellant, who had not pleaded guilty to the same and claimed to be tried. The prosecution had, therefore, examined; (1) Maganbhai Morarbhai PW.1 Exh.9, (2) Thakorbhai Gopalbhai,PW.2 Exh.11, (3) Savitaben Vanmalibhai Patel, PW.3 Exh.14, (4) Dr.Kiranbhai Ratilal Pensuria, PW.4 Exh.15, (5) Dhanuben Maganbhai,PW.5 Exh.18, (6) Maheshbhai Maganbhai Patel, PW.6 Exh.19, (7) Dipakbhai Maganbhai,PW.7 Exh.20, (8) Motiram Gappuji Yadav, PW.8 Exh.21, (9) Yusufbhai Ismailbhai Surti, PW.9 Exh.23, (10) Vimalkumar Uttambhai Manilal, PW.10 Exh.24, (11) Jesminkumari Uttambhai Patel PW.11 Exh.25, (12) Thakorbhai Bhagwandas,PW.10 Exh.27, (13) Rameshchandra Hargovandas Tapali, PW.13 Exh.28, (14) Satishbhai Hargovandas Tapali,PW.14 Exh.30, (15) Navinchandra Ishwarbhai Prajapati, PW.15 Exh.31, (16) Ganpatbhai Chimanbhai Gamit, PW.16 Exh.32, and Tersinhbhai Varsingbhai Parghi, PW.17 Exh.35, to prove its case against the appellant. The prosecution had also produced documentary evidence, such as, complaint filed by Maganbhai at exh.10, inquest panchnama at exh.12, postmortem notes of the deceased at exh.17, panchnama of the place of occurrence etc. in support of its case against the appellant. After recording of evidence of the prosecution witnesses was over, the learned Judge had explained to the appellant the circumstances appearing against him from the evidence of the prosecution witnesses and recorded his further statement as required by section 313 of the Code of Criminal Procedure, 1973. In his further statement, the claim of the appellant was that the case of the prosecution against him was false, but he had not examined any witness in support of his defence.

4. On appreciation of evidence adduced by the prosecution, the learned Judge held that it was proved beyond reasonable doubt that the deceased had died a homicidal death. The learned Judge was of the opinion that the evidence of two child witnesses, namely, Vimalkumar Uttambhai and Jesminkumari Uttambhai was reliable, cogent as well as trustworthy and that the said evidence proved that the appellant had strangulated the

deceased to death.In view of the above referred to conclusions, the learned Judge has convicted the appellant under section 302 I.P.C. and punished him with R.I. for life, giving rise to the present appeal.

5. Mr. D.M.Shah, learned advocate, who is appointed as amicus curiae, after going through the record of the case, submitted that the child witnesses have stated in their evidence that after the incident, the appellant had run away from the back door of the kitchen, but the panchnama of place of occurrence does not establish that there was any door in the kitchen and as the evidence of child witnesses is not corroborated in material particulars, the impugned judgment should be set aside. It was claimed that the evidence led by the prosecution in the form of testimonies of child witnesses is infirm as well as not satisfactory and, therefore, the appellant is entitled to the benefit of reasonable doubt. What was argued was that the child witnesses were tutored not only by the police officers, but also by the relatives of the deceased and, therefore, their evidence should not have been accepted by the learned Judge. According to the learned counsel for the appellant, motive which prompted the appellant to commit the crime in question is not proved by the prosecution beyond reasonable doubt and in absence of motive, evidence of child witnesses, which is not corroborated by any independent evidence on record, should not have been acted upon by the learned Judge. It was argued that the appreciation of evidence made by the learned Judge is contrary to the well settled principles of law and, therefore, the appeal should be allowed.

6. Mr. R.M.Chauhan, learned A.P.P. for the State Government contended that the evidence of child witness Vimalkumar as well as that of Jesminkumari,is not only reliable, trustworthy and cogent, but evidence of one child witness corroborates evidence of another child witness and, therefore, the learned Judge of the Trial Court, who had the advantage of observing demeanour of the child witnesses, did not commit any error in placing reliance on their evidence for the purpose of convicting the appellant under section 302 I.P.C. The learned A.P.P. claimed that the evidence on record does not show that any of the child witnesses was tutored either by the police officer or by the relatives of the deceased and as none of them had any reason to depose falsely against the appellant, who is their father, the appeal should be dismissed by the Court. According to the learned A.P.P., the claim made by both the child witnesses viz. that after the incident, the appellant had run away from the door placed in the kitchen, was not challenged in their

cross-examination at all and, therefore, non-mention of the door in the panchnama is of little consequence and cannot discredit the testimonies of the child witnesses. The learned counsel emphasised that the evidence of complainant Maganbhai exh.9 and that of witness Dhanuben exh.18 establishes the motive beyond reasonable doubt to the effect that the appellant had doubt about character of the deceased and had, therefore, strangulated her to death. What was asserted was that cogent and convincing reasons have been assigned by the learned Judge of the Trial Court for coming to the conclusion that the appellant is guilty of the offence punishable under section 302 I.P.C. and, therefore, well reasoned conviction of the appellant should be upheld by the Court.

7. We have considered the submissions advanced at the Bar as well as reappreciated the whole evidence on record because record and proceedings is received by the Court. The fact that the deceased had died a homicidal death is not in dispute. Dr. Kiranbhai R. Pensuria,PW.4 Exh.15 has stated in his evidence before the Court that on August 4, 1997 at about 3.10 P.M. the dead body of the deceased was brought to Civil Hospital for postmortem examination and that postmortem examination of the deceased was carried out by him as well as by Dr. M.I.Shah. According to the doctor, on external examination of dead body, ligature mark on neck of the deceased was found and that the deceased had died because of asphyxia resulting from strangulation. The evidence of Dr. Pensuria stands corroborated by contemporary record viz. postmortem notes prepared by him and produced at exh.17. Further, the injuries sustained by the deceased are also noticed in inquest panchnama. The two child witnesses have also stated in their evidence that the appellant had strangulated their mother to death. Having regard to the facts of the case, we are of the opinion that the finding recorded by the learned Judge that the deceased had died a homicidal death, is eminently just and is hereby upheld.

8. As observed earlier, the case of the prosecution rests on the testimonies of child witnesses. Before discussing the evidence of child witnesses, it would be advantageous to refer to the law relating to child witness. Section 118 of the Evidence Act deals with the question of competency of persons to testify. Under this section, all persons are competent to testify, unless they are, in the opinion of the Court, (a) unable to understand the questions put to them, or (b) to give rational answers to those questions, owing to (i) tender

years, (ii) extreme old age, (iii) disease of mind or body,or (iv) any other such cause. Even a lunatic,if he is capable of understanding the questions put to him and giving rational answers,is a competent witness. With respect to children, no precise age is fixed by law within which they are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. A child is not an incompetent witness by reason of his age. A child of tender years is not, by reason of his youth, as a matter of law, disqualified as a witness. There is no precise age which determines the question of competency. According to section 118 of the Evidence Act, a child of tender age is a competent witness if it appears that it can understand the questions put to it and give rational answers thereto. This section vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. When a young child is a witness, the first step for the Judge or Magistrate to take is to satisfy himself that the child is the competent witness within the meaning of section 118 of the Evidence Act and for this purpose, preliminary inquiry should be held. It is the duty of the Court to ascertain in the best way, which it can, whether from the extent of his intellectual capacity and understanding the child witness is able to give a rational account of what he has seen, heard or done at a particular occasion or in other words, the witness understands the duty of speaking truth or not. Competency of young children can be ascertained by putting a few questions to them in order to find out whether they are intelligent enough to understand what they had seen and afterwards inform the court thereof. The holding of a preliminary inquiry is merely a rule of prudence and is not a legal obligation upon the Judge. It is desirable that after holding a preliminary inquiry, Judges and Magistrates maintain record incorporating opinion that the child understands the duty of speaking truth. However, absence of recording of such an opinion does not make evidence of a child witness inadmissible. Opinion of the Court in this behalf can be gathered by the appellate Court from circumstances appearing in the case if there is no certificate by the learned Trial Judge. Though no precise criteria for appraising the evidence of a child witness can be laid down, yet one broad test is whether there was possibility of any tutoring. If this test is found in the positive, the Court will not, as a rule of prudence, convict the accused on a murder charge on the basis of child evidence unless it is corroborated to material extent in material particulars, directly connecting the accused with the

crime. At the same time, if otherwise the testimony of a child witness is not shown to be tainted with any such infirmities, it calls for due credence. A child in the innocent purity of its mind and unsophistication is more likely to come forth with version which is unbiased, unsoiled, natural and forthright. It is less prone to manipulation, motivation and spirit of vendetta.It can as well be spontaneous and inspiring, once the child is enabled to over-come the initial shock and awe, and ensured protection, security, compassion and given confidence to come out with what was seen. Further, some of the children are fairly intelligent, truthful and straight forward, and there is no reason to start with a presumption of untrustworthiness in the assessment of their evidence. The merit of evidence has to be judged on the touchstone of its own inherent intrinsic worth. In the case of MOHAMED SUGAL ESA MAMASAN RER ALALAH v. THE KING, AIR 1946 Privy Council, 3, it is held as under :-

> "In England, where provision has been made for the reception of unsworn evidence from a child, it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But, in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence, a Court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law."

9. Having noticed the principles, we would discuss the evidence of child witness Vimalkumar and another child witness Jesminkumari. Vimalkumar PW.10 Exh.24 was aged about 10 years at the time when his deposition was recorded by the learned Judge on September 15, 1999. In order to satisfy, whether Vimalkumar understood the questions put to him and was in a position to give rational answers to those questions or not,the learned Judge has maintained record incorporating the answers given by him to the questions put by the learned Judge. In the first question, the child witness informed the Court that he was studying in 4th standard and that he was daily visiting temple. Further, the witness stated before the Court that he had come to the Court and that he was likely to be visited with sin if he uttered falsehood. On holding of preliminary inquiry, the

learned Judge was satisfied that the child witness was capable of giving rational account of what he had seen, heard or done at a particular occasion and, therefore, had recorded his testimony after administering oath to him. The witness has stated that name of his father was Uttambhai, whereas the name of his mother was Pushpaben and he has sister whose name is Jesminben, who is elder to him. The witness informed the learned Judge that his mother is not alive and that he in the company of his parents and sister was residing at Rander. According to him, on the date of incident, during the night hours, he was sleeping near his mother on the floor; whereas his sister was sleeping on a cot and his father was also sleeping on the floor. What is stated by the witness is that he was physically lifted by his father from the floor and was placed on the cot in which his sister was sleeping and, therefore, he was awaken. It is stated by the witness that thereafter his father had strangulated his mother, as a result of which his mother had raised shouts, but in order to prevent his mother from shouting, the appellant had gagged her mouth and that his mother had expired. It is claimed by the witness that after the incident, his father had run away through the back door of the house. In the cross-examination, the witness has stated that after the incident, he had gone near his mother and that on the next day of the incident, police had come as well as his grand father, grand mother and maternal uncle had also come. Further, the witness in his cross-examination has stated that the police had recorded his statement and that at that time the parents of his mother were also present. The witness has emphatically denied the suggestion made by the defence that he was tutored by the police and that he was deposing falsely against the appellant at the instigation of his maternal uncle.

10. Similarly, we find that Jesminben Uttambhai was aged about 12 years when her evidence was recorded by the learned Judge on September 15, 1999. In the case of Jesminkumari also, the learned Judge has maintained record which was made by him to satisfy himself that the child witness was able to understand the duty of speaking truth. After satisfying himself that the child witness was intelligent and was capable of giving rational answers, the learned Judge had administered oath to her and recorded her statement. This witness also stated in her substantive evidence before the Court that during the night hours of day of the incident, she was sleeping on cot, whereas her mother, her brother and her father were sleeping in the front room on the floor. The witness has stated that after some time her father had lifted her

brother and had placed him by her side on the cot, as a result of which she had awaken. What is claimed by the witness is that thereafter her father had strangulated her mother, as a result of which her mother had raised shouts and her aunt named Jashuben staying just opposite her house, had come to the place of incident. In cross-examination, the witness stated that she had informed her grand father and grand mother that the appellant was beating her mother. This witness has also denied the suggestion made by the defence that she was deposing falsely against the appellant at the instance of her maternal uncle. If we read the cross-examination of two child witnesses, it becomes evident that the claim made by them that they had seen the appellant strangulating the deceased, is not seriously challenged at all. A bare reading of their evidence makes it manifest that though the witnesses were of tender years, they were capable of understanding the duty of speaking truth before the Court. Further, their evidence makes it very clear that they were intelligent enough to understand what they had seen and afterward inform the Court thereof. The evidence of two child witnesses is unbiased, unsoiled, natural and forthright. It is not brought on record of the case that they have deposed against the appellant because of manipulation, motivation or spirit of vendetta and that too at the instigation of their maternal uncle. The two innocent children have no reason to depose falsely against the appellant, who is their real father and they have narrated the incident as they had seen it in a forthright and simple manner. Having regard to the facts of the case, we are of the opinion that the learned Judge of the Trial Court, who had advantage of observing demeanour of the two child witnesses, did not commit any error in placing reliance on their evidence for the purpose of convicting the appellant under section 302 of the Indian Penal Code. Further, the motive which had prompted the appellant to commit the crime in question, stands amply proved by the evidence of complainant Maganbhai as well as that of Dhanuben, who is mother of the deceased. Both the witnesses have categorically stated that the appellant had doubt about character of the deceased and had earlier also tried to strangulate her. We may say that the motive stated by the two witnesses is not effectively challenged by the appellant at all during their cross-examination. Under the circumstances, the evidence of child witnesses becomes more reliable and acceptable. Further, the evidence of child witnesses also gets corroboration from the evidence of Satishbhai Hargovandas Exh.30, who is their maternal uncle and also from the medical evidence on record which suggests that the

deceased was strangulated. On overall view of the matter, we are satisfied that the conviction of the appellant recorded under section 302 of the Indian Penal Code is well founded and no case is made out by the learned counsel for the appellant to interfere with the same in the present appeal. The net result of the above discussion is that we do not find any substance in the appeal and the appeal is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed. Muddamal to be disposed of in terms of direction given by the learned Judge in the impugned judgment.

(J.M.Panchal,J.)

(H.H.Mehta,J.)

(patel)